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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1528

B & L SALES ASSOCIATES,
PETITIONER

v.

H. DAROFF & SONS, INC.,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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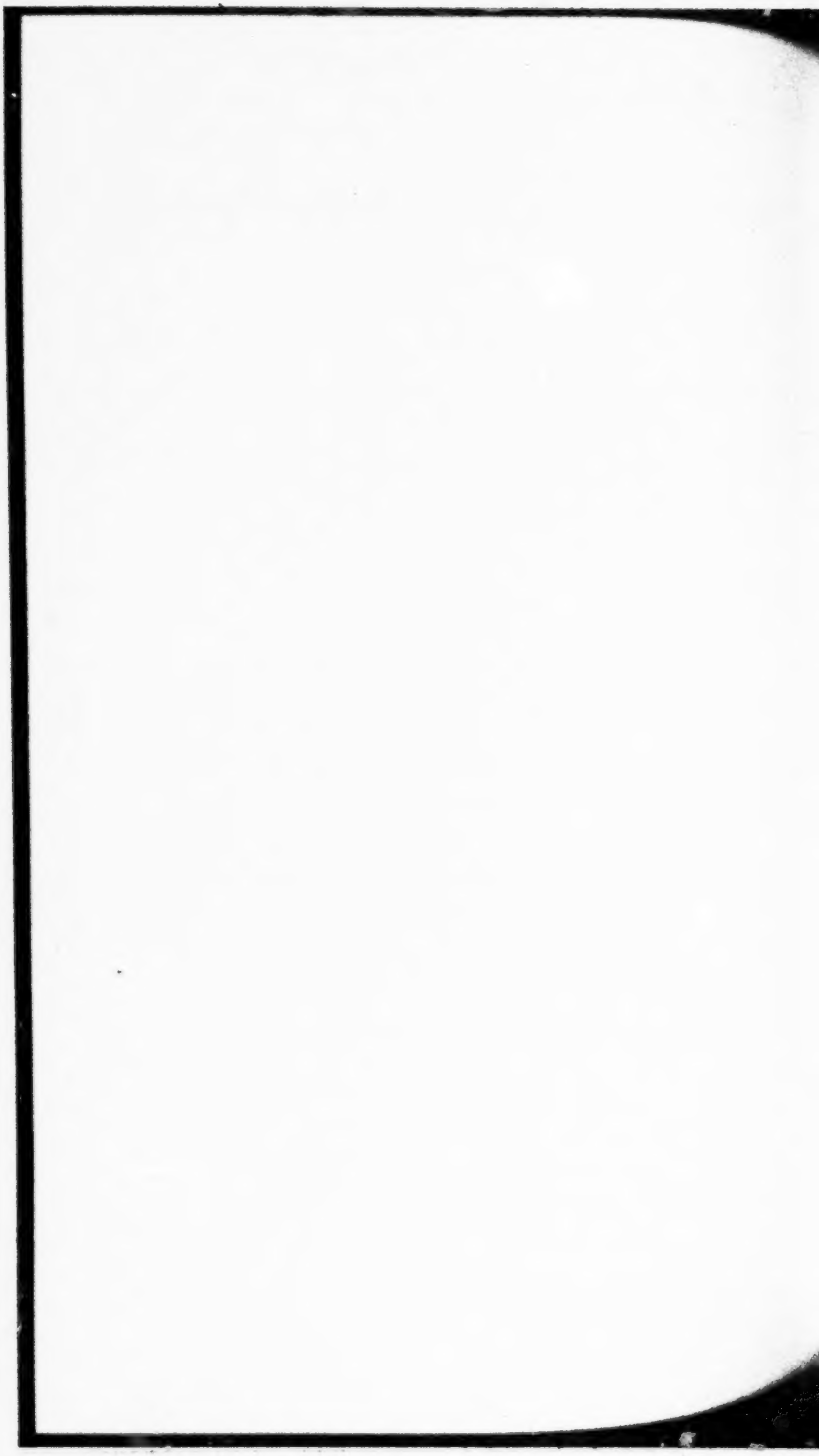

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No. ———

B & L SALES ASSOCIATES,
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v.

H. DAROFF & SONS, INC.,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner B & L Sales Associates respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 5, 1970.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District

Court for the Southern District of New York with respect to respondent's Motion for Summary Judgment is reported at 298 F.Supp. 908, and 162 U.S. P.Q. 370 and appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of New York in granting respondent's motion to strike petitioner's demand for a jury trial.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on Feb. 5, 1970. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 15 U.S.C. §1122 and 28 U.S.C. §1254(1).

Questions Presented

1. Whether summary judgment against petitioner's complaint for trademark infringement was proper, despite the existence of relative material facts, admittedly in dispute by the Court of Appeals.
2. Whether summary judgment against petitioner based upon a finding of non-infringement was proper, when that issue was not presented by respondent in its motion papers for summary judgment and petitioner was not otherwise afforded an opportunity to present evidence relative to the issue.
3. Whether respondent conclusively avoided infringement of petitioner's registered trademark merely by associating with it respondent's nationally known and widely used Botany 500 trademark.
4. Whether summary judgment dismissing petitioner's complaint on the grounds of non-infringement is proper when the complaint also contains counts of unfair competition and trademark dilution.

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5. Whether dismissal of petitioner's claim to a jury trial as moot is proper in view of a still pending counterclaim by respondent.

Statutory Provisions Involved

United States Code, Title 15:
§1114(1) Remedies — Infringement
Any person who shall, without the consent of the registrant—

> (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
>
> (b) reproduce, counterfeit, copy or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;

shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

Statement of the Case

Petitioner, B & L Sales Associates, filed a three count complaint against respondent H. Daroff & Sons, Inc. in the United States District Court for the Southern District of New York (R. 3).[1] Jurisdiction was claimed under 15 U.S.C. §1121, 1125(a), 1125(b), 1126(b), 1126(h), and 1126(i), and under 28 U.S.C. §1138(a) and (b), and 29 U.S.C. §1132 (a). Petitioner alleged its federally registered trademark COME ON STRONG, which it used or licensed continually from 1964 in connection with the sale of clothing and other products was infringed by respondent's subsequent use of the identical mark in advertising a line of men's clothing. Unfair competition and dilution of the value of the petitioner's trademark such as to cause confusion and misunderstanding in the eyes of the buyers, the public and prospective licensees was also alleged. One major prospective licensee refused a license solely because of respondent's infringement (R. 5, 17). Petitioner sought money damages and injunctive relief. A jury trial was duly requested (R 9-10).

Although respondent generally denied the complaint and asserted numerous affirmative defenses, it admitted spending sums in excess of $250,000.00 in clothing advertisements making prominent use of COME ON STRONG (R. 31).

Respondent's motion to strike petitioner's demand for a jury trial, was granted without opinion by the District Court (R. 29). Respondent contended that since petitioner sought injunctive relief as well as damages for respondent's tortious acts the claim was equitable in nature and therefore this Court's decision in *Dairy Queen Inc.* v. *Wood* 369 U.S. 469 (1962) was not applicable.

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[1] "R" refers to the printed Appendix in the Court of Appeals.

Respondent then filed a Motion for Summary Judgment supported by a brief, Statement under Rule 9(g) under the Rules of the Southern District of New York and affidavits. In these papers and at oral hearing respondent contended only that it was entitled to summary judgment because petitioner's trademark was invalid. At no time did respondent contend that it was entitled to summary judgment because it did not infringe. Exemplary of this approach are the headnotes of respondent's brief and its "Statement of Motion" supporting its Motion for Summary Judgment which only contend that petitioner's mark is weak.[2]

Petitioner responded only to the specific issues raised in the motion papers by filing several affidavits that traced petitioner's first and continuous use of COME ON STRONG as a trademark in the clothing trade (R. 141, 147). These affidavits established use by petitioner and its licensees of COME ON STRONG as a trademark on more than $250,000.00 worth of clothing and expenditures of at least $10,000 in developing and promoting the trademark, COME ON STRONG. They also asserted that COME ON STRONG was recognized by consumers and professional buyers of clothing as a trademark of petitioner (R. 141, 147). These affidavits also stated that petitioner had six licensees, three of whom used COME ON STRONG on clothing (R. 143). Two of these three earlier terminated or made their license inactive as a direct result of respondent's infringing use of COME ON STRONG (R. 143, 144).

Except for the above showing that it lost licensees because of respondent's infringement, the petitioner did not offer any additional direct evidence with respect to the

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[2] Both the headnotes and "Statement of Motion" are reproduced in the Appendix C & D. The "Statement of Motion" summarizes the arguments advanced by respondent in all motion papers and at oral argument.

issue of infringement and its subsidiary issue of likelihood of confusion.

At the oral hearing the only issue argued to the District Court by either party related to the validity of petitioner's trademark and its registration. The District Court disregarded the issue discussed by the parties and granted summary judgment dismissing the Complaint on the grounds that respondent's use of "Botany 500" coupled with petitioner's mark, COME ON STRONG, precluded any likelihood of confusion, and therefore precluded infringement of the mark and registration.[3]

The Court of Appeals acknowledged the "District Court declined to rule on the validity of the trademark registration, addressing itself instead to the scope of protection afforded by federal trademark law, and the factual question of the alleged infringement" (A. 15).[4]

In affirming, the Court of Appeals concluded that respondent's association of its famous "Botany 500" trademark with COME ON STRONG precluded any possible confusion, despite respondent's use of COME ON STRONG at the top of its ads in large distinctive black letters and in at least one above and apart from Botany 500 (A. 15).

The Court of Appeals also concluded that although there were disputes regarding the factors necessarily considered in resolving the likelihood of confusion between the marks, that such disputes were insufficient to overcome the inference that no confusion could exist where respondent always used "Botany 500" with COME ON STRONG.

Petitioner's claim to a jury trial was dismissed as moot.

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[3] On October 24, 1969, the District Court certified its judgment of April 26, 1969, *nunc pro tunc*. Respondent's compulsory counterclaim remains pending in the District Court. We assume that all three counts in the Complaint were dismissed.

[4] "A" refers to Appendix, infra.

Reasons for Granting the Writ

1. The Decision Below Conflicts In Principle With This Court's Holding In Menedez v. Holt, 128 U.S. 154 (1888) That Infringement Could Not Be Avoided By Using The Infringer's Trade Name With The Infringing Mark.

The Court of Appeals held the exhibits themselves obviated any possible mistake as to the source of respondent's goods. These exhibits comprised only ads of respondent that combined petitioner's COME ON STRONG trademark with respondent's nationally known mark "Botany 500". Because of this conjunctive use of two marks, the Court of Appeals concluded it could disregard disputed facts relating to the issue of confusion.

This Court on the other hand in *Menedez* v. *Holt*, 128 U.S. 514 (1888) held infringement could not be avoided by such conjunctive use where is stated:

> Holt & Co., then, having acquired the exclusive right to the words 'La Favorita,' as applied to this particular vendable commodity, it is no answer to their action to say that there was no invasion of that right because of the name of S. O. Ryder accompanied the brand upon flour sold by appellants, instead of the name Holt & Co. That is an aggravation and not a justification, for it is only trading in the name of another upon the reputation acquired by the device of the true proprietor.[5]

Although the *Menedez* case was decided in 1888, there is nothing in the Trademark Act of 1946 that would suggest

[5] This passage was cited in Petitioner's Brief before the Court of Appeals but the case was not mentioned in its opinion.

this holding is not still applicable.[6] See *Rockwood Chocolate Co.* v. *Hoffman Candy Co.*, 54 CCPA 1061 (1967); *Miles Shoes Inc.* v. *Macy & Co.*, 199 F.2d 602 (2nd Cir. 1952).

2. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals That Hold Likelihood Of Confusion Between Two Marks May Not Be Resolved Under 15 U.S.C. 1114(1) By A Mere Occular Comparison Of The Marks.

The Second Circuit held that there was no likelihood of confusion between the marks, based upon a visual examination of the respondent's advertisements only. No other evidence except respondent's admitted reputation was considered since petitioner was never afforded the opportunity to offer any.

The Fifth Circuit in *Frostie Co.* v. *Dr. Pepper Co.*, 341 F.2d 363 (5th Cir. 1965) substantially concurs in holding that an occular examination of the two marks might permit disposition of the case, although it does caution that all relevant evidence should be considered.

The Tenth Circuit has also stated there may be some cases that "may be determined by visual comparison, as where specific differences are so marked that general appearances could not be confusing" *Avrick* v. *Rockmont Envelope Co.*, 155 F.2d 568 (10th Cir. 1946). But in that case disposition by summary judgment on marks more remote ("Sky-Mail" and "Sky-Rite") was rejected.

On the other hand the Seventh Circuit in *Albert Dickinson Co.* v. *Mellos Peanut Co.*, 179 F.2d 265 (7th Cir. 1950) expressly rejects a summary judgment disposition of a claim of trademark infringement on the basis of a side by side visual comparison of marks to determine the effect on the

[6] The Trademark Act of 1946 forms Chapter 22 of Title 15 of the United States Code, and is popularly referred to as the Lanham Act.

ordinary purchaser.[7] That circuit requires testimony of ordinary and usual purchasers.

The Court of Customs and Patent Appeals is in accord with the view of the Seventh Circuit and thus is in conflict with the Second Circuit. *Lactona, Inc.* v. *Lever Bros.*, 144 F.2d 891 (C.C.P.A. 1944).

3. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals That Require The Party Moving For Summary Judgment To Show There Is No Genuine Issue Of Fact.

The Second Circuit held that petitioner had a burden of showing there was "a genuine issue as to a material fact" (A. 16). At least the Third, Eighth and District of Columbia Circuits have held to the contrary, placing the burden of showing there is no genuine issue of fact in a motion for summary judgment with the moving party. *Walling* v. *Fairmont Creamery Co.*, 139 F.2d 318 (8th Cir. 1943); *Kasper* v. *Baron*, 191 F.2d 737 (8th Cir. 1951); *Dulansky* v. *Iowa-Illinois Gas & Electric Co.*, 191 F.2d 881 (8th Cir. 1951); *Sprague* v. *Vogt*, 150 F.2d 795 (8th Cir. 1945); *Fairbanks, Morse & Co.* v. *Consolidated Fisheries Co.*, 190 F.2d 817 (3rd Cir. 1951); *Wittlin* v. *Giacalone*, 154 F.2d 20 (D.C. Cir. 1946).

4. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals That Hold Summary Judgment Is Improper When It Would Require Weighing Relative Worth Of A Number Of Fact Issues.

The Second Circuit held that a number of different facts must be considered in determining the existence of likeli-

[7] Citing a per curiam Second Circuit opinion in Marcus-Brier Sons, Inc. v. Marvlo Fabrics, Inc., 173 F.2d 29 (2nd Cir. 1949) which also appears to conflict in principle with the present case.

hood of confusion, and though some were disputed, they were insufficient to overcome an inference drawn from a visual examination of the exhibits. The Second Circuit thus considered the relative weight of such factors as the degree of similarity between the marks in appearance and suggestion, the similarity of the products for which the mark is used, the area and manner of concurrent use, the degree of care likely to be exercised by consumers, the strength of complainant's mark, actual confusion and an intent on the part of the alleged infringer to palm off his products as those of another.[8]

This holding is in direct conflict with decisons at least in the Fourth, Fifth, Seventh, Ninth and Tenth Circuits which have held that summary judgment should not be granted if it necessarily involves weighing facts. *Furton* v. *City of Menasha,* 149 F.2d 945 (7th Cir. 1945); *Pierce* v. *Ford Motor Co.,* 190 F.2d 910 (4th Cir. 1951); Cert. denied, 342 U.S. 887 (1951); *Stevens* v. *Howard D. Johnson,* 181 F.2d 390 (4th Cir. 1950); *Avrick* v. *Rockmont Envelope Co.,* 155 F.2d 568 (10th Cir. 1946). *Hawkinson Co.* v. *Dennis,* 166 F.2d 61 (5th Cir. 1948); *Detsch & Co.* v. *American Products Co.,* 152 F.2d 473 (9th Cir. 1946).

5. The Decision Below Raises an Important Question of Federal Law Interpreting Likelihood of Confusion of Trademarks Under the Trademark Act of 1946, Which This Court Has Not But Should Settle.

The issue of what tests are to be applied in determining likelihood of confusion between two trademarks under the relevant section of the Trademark Act of 1946, 15 U.S.C. 1114(1), is a frequently reccurring problem which the

[8] The marks and goods of the parties, their trading area and ultimate consumers were the same. The Second Circuit essentially concluded no inference from these facts could overcome lack of confusion because "Botany 500" was also used on respondent's advertisements.

Court has never reviewed in the twenty-four years of the act. 15 U.S.C. 1114(1) is a working tool, not only of attorneys, but many businessmen in their daily determination of whether a particular trademark or service mark should be used in connection with the sale of products or services. The importance of the issue is not confined to litigation and advocacy but extends to everyday advertising and marketing decisions of business executives who must commit hundreds of millions of dollars in the development of new trademarks that are selected in the light of existing competitive marks. Approximately 30,000 applications for trademark registration under the Trademark Act of 1946 were filed in 1969 alone. Approximately 20,000 issued and 15,000 are pending.[9] Most of these applications were undoubtedly preceded by an independent trademark search by trademark counsel which required an evaluation of possible confusion with some of the almost 900,000[10] existing registrations. While it is impossible to determine accurately the full extent of trademark litigation, its magnitude perhaps may be understood from a review of Shepard's United States Citations, Part 2, 1968 in which approximately 270,000 citations of trademark cases are set forth on more than 900 pages. And most of these cases probably involved resolutions of the issue of likelihood of confusion.

Everyone of the hundreds of thousands of trademarks filed under the Trademark Act of 1946 involves significant financial commitments because such filings are all preceded by use in interstate commerce. These commitments to advertising and development of trademark goodwill

[9] These figures are calculated from the Official Gazettes of the Patent Office.

[10] A number of these have expired, but generally trademark counsel are concerned with expired registrations because the marks may still be in use.

obviously involve undertakings of hundreds of millions of dollars every year. Because of the staggering sums involved, the extensive application of the Trademark Act of 1946 to tens of thousands of merchants, large and small, and in the interest of the public in assuring that confusing trademarks will not proliferate, a uniform approach to evaluating the likelihood of confusion is desirable.

6. The Decisions Below Granting a Motion for Summary Judgment on Issues Not Fairly Present in the Moving Papers so Far Depart from the Accepted and Usual Course of Judicial Proceeding as to Call for an Exercise of This Court's Power of Supervision.

Respondent's motion papers for summary judgment were directed solely to the issue of the invalidity of petitioner's trademark. Petitioner responded only to that issue. The District Court granted summary judgment on the issue of non-infringement without affording petitioner an opportunity to submit evidence relative to the latter issue. The Court of Appeals also ignored petitioner's contention that it was never afforded an opportunity to meet the issue upon which the District Court dismissed this case.

It is manifest that a disposal of a case by summary judgment without allowing the party against whom judgment is granted an opportunity to meet the issues is a departure from the usual course of judicial proceedings and is inconsistent with due process requirements such as to require an exercise of this Court's power of supervision. Failure to allow full development of all facts before a summary disposition has generally been rejected in other circuits. *G. D. Searle & Co.* v. *Chas. Pfizer & Co.*, 231 F.2d 316 (7 Cir. 1956). *Frostie Co.* v. *Dr. Pepper Co.*, 341 F.2d 363, 367 (5th Cir. 1965); *Lundeen* v. *Cordner*, 356 F.2d

169 (8th Cir. 1966); *Palmer* v. *Chamberlain*, 191 F.2d 532 (5th Cir. 1951); *Pacific American Fisheries* v. *Mullaney*, 191 F.2d 137 (9th Cir. 1951).

Conclusions

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX A

OPINION OF COURT OF APPEALS

MOORE, *Circuit Judge:*

Plaintiff-appellant B & L Sales Associates (B & L) filed a complaint against H. Daroff & Sons, Inc. (Daroff) alleging trademark infringement, unfair competition and dilution of trademark. B & L duly filed a demand for jury trial. Daroff answered with a general denial, filed a counterclaim seeking cancellation of the trademark in dispute, and moved to strike the demand for jury trial. The latter motion was granted by Judge Tyler on September 17, 1968. Thereafter, Daroff filed a motion for summary judgment. The motion was heard upon all the pleadings and upon affidavits supporting and opposing the motion. Following oral argument, Judge Bryan granted the motion and entered judgment for defendant. 298 F. Supp. 908 (S.D.N.Y. 1969).

The controversy stems from Daroff's (manufacturers of Botany 500 clothes) use of the phrase "Come on Strong" in its Botany 500 advertising and promotion beginning with the year 1966. B & L had registered its trademark "Come on Strong" for work clothing and Leisure wear on January 18, 1966, and the trademark was later registered for a variety of products ranging from all-purpose cleaners to bedroom and living room sets. Plaintiff alleged use and extensive word-of-mouth promotion of the slogan beginning in 1961. Subsequent to the 1966 registration of its mark for work and leisure clothing, B & L entered into licensing agreements with several small manufacturing concerns permitting use of the trademark "Come on Strong" for a variety of products, in addition to using the mark for its own goods. One of B & L's licensees was The Foster Company, a competitor of Daroff in Philadelphia. Follow-

ing the appearance of Daroff's promotional material bearing the slogan "Come on Strong," Foster discontinued its use of the phrase authorized by the licensing agreement. Thus plaintiff alleges, in addition to confusion with B & L's own products, a diminution of the value of the registered trademark by virtue of the confusion Daroff's use of the phrase has created among plaintiff's licensees.

The district court declined to rule on the validity of the trademark registration, addressing itself instead to the scope of protection afforded by federal trademark law, and the factual question of the alleged infringement. The court determined on the pleadings and affidavits that no showing of infringement had been made, and awarded summary judgment to Daroff. We affirm that disposition.

Exhibits showing the graphic material used in the Botany 500 promotion demonstrate that the phrase appeared in store displays, posters and advertisements in various national magazines as follows: a male model, dressed presumaby in one of defendant's suits, is posed in a commanding position near a private airplane, a sports car or some such symbol of elegant masculinity. He is generally shown to be the object of an adoring gaze lavished upon him by a correspondingly elegant and appealing female model. The rapture in her gaze bespeaks appreciation for the gentleman's tailor. The phrase "COME ON STRONG" appears in the upper left hand corner printed in large block letters. Directly below this phrase, in somewhat smaller, yet readily visible, block-type print appears the phrase "With Botany 500." Thus the copy reads "COME ON STRONG with Botany 500." "Botany 500" also appears in a prominent position at the bottom of the advertisement followed by the words "tailored by Daroff." In at least one of the advertisements, "Come on Strong" stands alone in the upper portion of the display, but "Botany 500" and "tailored by Daroff" appear prominently below the picture.

Judging from the appearance of the advertisements and from defendant's conceded reputation as a well-known manufacturer of men's suits, it is inconceivable that these materials were intended to attribute the source of the goods to anyone other than defendant Daroff. It is quite obvious that the phrase "Come on Strong" was intended only to describe the manner in which Botany 500 clothing would assist the purchaser in projecting a commanding, confident, "'strong" image to his friends and admirers, and no intent to use the phrase in a trademark sense can be inferred from these promotional materials. Moreover, the statement by affidavit of Daroff's vice president that defendant has never directly applied the phrase to its products by tag, label or otherwise is unchallenged.

The district court correctly observed that the federal remedy against trademark infringement is not plenary, and is only available when the plaintiff can show a likelihood of confusion, mistake or deception arising in the market as a resut of defendant's use of the mark registered to plaintiff. 15 U.S.C. §1114(1)(a); see *Miss Universe, Inc.* v. *Alfred Patricelli*, 408 F.2d 506 (2d Cir. 1969); *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F.2d 538 (2d Cir. 1956). Thus, in order to succeed in this action, plaintiff was required to prove that a likelihood existed of confusion in the marketplace regarding the source of the goods marketed by defendant resulting from its advertising use of the phrase "Come on Strong," a phrase registered to plaintiff as a trademark for work clothes and leisure wear.

To survive a motion for summary judgment, plaintiff's offer of proof must create a "genuine issue as to [a] material fact." Rule 56(c), F.R.C.P. The only material fact in plaintiff's case was whether or not the "likelihood of confusion" described above existed. We have held that a number of factors must be considered in determining

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the existence of a likelihood of confusion, among which are: "the degree of similarity between the marks in appearance and suggestion; the similarity of the products for which the mark is used; the area and manner of concurrent use; the degree of care likely to be exercised by consumers; the strength of the complainant's mark; actual confusion; and an intent on the part of the alleged infringer to palm off his products as those of another." *Miss Universe, Inc.* v. *Alfred Patricelli,* 408 F.2d 506, 508 (2d Cir. 1969). Appellant urges upon us our suggestion in *Kiki Undies Corp.* v. *Promenade Hosiery Mills, Inc.,* 411 F.2d 1097, 1099 (2d Cir. 1969), that such factors are variable and relative and no single one is determinative, and that the trial court must consider them all in the balance before he determines the ultimate question upon which they bear. Judge Bryan explicitly observed this weighing and balancing technique. It may be that some of the factors listed above were disputed in the pleadings and affidavits, but the trial court correctly concluded that those factors were not sufficient to overcome the obvious inference from the exhibits themselves that no consumer or professional buyer of men's suits could possibly mistake the source of the advertised goods by believing that they were manufactured by plaintiff. That fact alone, weighed against all of plaintiff's allegations, affidavits and arguments eliminated even the possibility of confusion and entitled Daroff to summary judgment.

Moreover, the pleadings and exhibits conclusively establish, despite appellant's arguments to the contrary, that Daroff's use in advertising of the phrase "Come on Strong" constituted "a use, otherwise than as a trade or service mark . . . of a term or device which is descriptive of and used fairly and in good faith only to describe to users the goods or services" of the defendant, within the meaning of the statutory defense to an infringement action pro-

vided in 15 U.S.C. §1115(b). "Come on Strong" and variations of that phrase, as the various exhibits amply demonstrate, is a common slang term, the general use of which plaintiff cannot prevent by registering it in connection with certain goods. See *Kiki Undies Corp.* v. *Alexander's Department Stores, Inc.*, 390 F.2d 604 (2d Cir. 1967). Plaintiff offered no proof that Daroff used "Come on Strong" as a trademark or as anything other than a slang term describing a presumably desirable effect. Daroff is therefore entitled to summary judgment as well on its statutory defense. *Kiki Undies Corp.* v. *Alexander's Department Stores, Inc., supra.*

Having concluded that Daroff's use of the disputed phrase presents no likelihood of confusion, that the pleadings and record below further establish a defense to the actions brought by B & L and that the district court's grant of summary judgment was therefore proper, we need not consider plaintiff's contentions with regard to the motion for jury trial. Since B & L was not entitled to a trial at all on the pleadings, denial of its motion for trial by jury is moot.

Judgment affirmed; appeal from Judge Tyler's order dismissed.

APPENDIX B

OPINION OF DISTRICT COURT

BRYAN, *District Judge:*

The complaint of plaintiff B & L Sales Associates (B & L), in three counts, charges defendant H. Daroff & Sons, Inc. (Daroff), with trademark infringement, unfair competition, and trademark dilution. The same facts, many of which are not in dispute, form the basis of the three claims. Daroff now moves for summary judgment pursuant to Rule 56 F.R.C.P. Jurisdiction is based on 15 U.S.C. § 1121 and 28 U.S.C. §§ 1338(a) and (b).

On January 18, 1966, B & L, a partnership, registered its trademark "Come On Strong" for work clothing and leisure wear. Prior to this time, Levy, a B & L partner, had begun to promote the slogan "Come On Strong" in connection with clothing and an assortment of other unrelated products. As of the end of 1967 it appears that a minimal amount, if anything, was spent either by B & L, its licensees, or its individual partners on advertising "Come On Strong" and the volume of goods sold, in terms of gross sales, bearing the "Come On Strong" trademark did not greatly exceed $10,000 from 1961 through 1965. Resales of clothing by plaintiff's licensees carrying the "Come On Strong" label were apparently limited to several small cities in the Northeastern states. According to plaintiff, the mark "Come On Strong" has been publicized mainly, if not entirely, by word-of-mouth advertising which has "made the mark 'Come On Strong' well known as a trademark of plaintiff among a limited number of people influential in the clothing trade."

Daroff, a subsidiary of Botany Industries, is a well known manufacturer of men's clothing and the owner of the trademark "Botany 500". About November 1, 1965 Botany

Industries mailed to its stockholders the Annual Report for the year ended July 1, 1965, which contained an example of an advertisement for suits and sport coats manufactured by Daroff. In the upper left corner appears the slogan "Come On Strong" in large block-type letters. Directly below the slogan in somewhat smaller, yet readily visible, block-type print appears the phrase "With 'Botany 500'". Thus, taken as a whole the caption reads "Come On Strong with 'Botany 500' ". At the bottom of the advertisement, in a prominent position, appears the trademark "Botany 500" followed by the words "tailored by Daroff". This was more than two months before plaintiff registered its trademark.

Shortly after the annual report was distributed, posters and store displays were mailed to retail stores throughout the country. In 1966, advertisements substantially similar to that included in the 1965 Annual Report, and described above, appeared in various national magazines. Plaintiff claims that these advertisements infringe its trademark "Come On Strong" and have caused plaintiff severe financial loss. Plaintiff demands compensatory damages in the sum of $250,000 and treble damages.

The test of trademark infringement is whether the defendant's mark is so similar to plaintiff's that it is "likely to cause confusion, or to cause mistake, or to deceive" as to the source or origin of defendant's goods. 15 U.S.C. § 1114. See *Miss Universe, Inc.* v. *Alfred Patricelli,* F.2d (2d Cir. 1969); *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F.2d 538 (2d Cir. 1956); *Jean Patou, Inc.* v. *Jacqueline Cochran, Inc.*, 201 F. Supp. 861 (S.D.N.Y. 1962). Federal law does not bestow property rights upon the owner of a trademark in the sense in which a patent or copyright holder is given protection. The holder of a registered trademark can succeed in an infringement suit only by showing a likelihood of confusion. Among the

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factors which are considered in determining the likelihood of confusion are: "the degree of similarity between the marks in appearance and suggestion; the similarity of the products for which the mark is used; the area and manner of concurrent use; the degree of care likely to be exercised by consumers; the strength of the complainant's mark; actual confusion; and an intent on the part of the alleged infringer to palm off his products as those of another." *Miss Universe, Inc.* v. *Alfred Patricelli,* F.2d (2d Cir. 1969). See *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.,* 234 F.2d 538, 543 (2d Cir. 1956).

Weighing all of these factors it is plain that there is no likelihood that those viewing defendant's advertisements would think that plaintiff is the manufacturer of the clothes depicted in the advertisement. There being no likelihood of confusion, plaintiff cannot succeed in this action.

While defendant has used the slogan "Come On Strong", it has clearly identified the source of the advertised suits by including its trademark "Botany 500". No attempt is made to play down the prominence of "Botany 500" or the fact that Daroff is the manufacturer. In view of the fact that "Botany 500" is among the better known trademarks in men's suits, it is unlikely that consumers will think that B & L has manufactured defendant's suits simply because the slogan "Come On Strong", which also happens to be a trademark registered by plaintiff, is included in defendant's advertisement. Moreover, plaintiff admits that its trademark has become known through word-of-mouth advertising only to a limited number of people influential in the clothing field. It is most unlikely that people having a thorough knowledge of the clothing industry, and particularly men's suits, would be misled by defendant's advertisement. It is evident that at least this sophisticated group, whom plaintiff apparently contends is the only group that now associates "Come On Strong" with B & L, could not

possibly, in light of the prominence given to the "Botany 500" trademark, be deceived or even confused.

Plaintiff urges that the trademark "Come On Strong" is fanciful and not descriptive and therefore that it acquired a valid trademark even in the absence of establishing secondary meaning. Without passing on the merits of this position, it is apparent from all the circumstances that defendant at least has used the slogan "Come On Strong" descriptively in order to describe the effect that "Botany 500" suits will have on the user. 15 U.S.C. §1115(b)(4).[1] See *Kiki Undies Corp.* v. *Alexander's Dept. Stores, Inc.*, 390 F.2d 604 (2d Cir. 1968). Without trying to determine the precise meaning of the phrase "Come On Strong", there is ample evidence in the record, which is conceded by plaintiff, indicating the phrase is a widely known slang expression having an aggressive connotation, and has been used on numerous occasions in this sense by various advertisers. The papers plainly indicate that the phrase was used by defendant in this descriptive sense rather than as a source of origin and undoubtedly would be so understood by the consuming public. Thus, even if the "Botany 500" trademark were not so well known, the context in which "Come On Strong" is used by defendant obviates any possibility of confusion. Moreover, even if plaintiff has not used "Come On Strong" descriptively, that phrase is clearly capable of being used descriptively. Plaintiff may not appropriate to itself common English slang terms and thus prevent others from using such phrases in their de-

[1] This section provides the following defense to an infringement action:

> "That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a trade or service mark, of the party's individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe to users the goods or sevices of such party or their geographical origin."

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scriptive sense. 15 U.S.C. 1115(b)(4). See *Kiki Undies Corp.* v. *Alexander's Dept. Stores, Inc., supra; Enterprises Educational Corp.* v. *Grosset & Dunlap, Inc.*, 256 F.Supp. 382 (S.D.N.Y. 1966).

The conclusion that there is no likelihood of confusion makes it unnecessary to pass upon defendant's primary contention that plaintiff's trademark is descriptive and thus invalid in the absence of secondary meaning and that in view of the limited funds expended on advertising and the limited volume of sales, secondary meaning as a matter of law cannot be established. Moreover, in the absence of a showing of likelihood of confusion, plaintiff is similarly precluded from proceeding on the theories of unfair competition and trademark dilution. See *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc., supra,* at 544; *Jean Patou, Inc.* v. *Jacqueline Cochran, Inc., supra,* at 865-867; *Field Enterprises Educational Corp.* v. *Grosset & Dunlap, Inc., supra,* at 390-391.

Defendant's motion for summary judgment is granted. Judgment for defendant will be entered accordingly.

IT IS SO ORDERED.

(s) FREDERICK v PELT BRYAN
United States District Judge

Dated: New York, N.Y.
April 25, 1969

JUDGMENT

The defendant having moved for summary judgment pursuant to Rule 56 Federal Rules of Civil Procedure, and the motion having come on to be heard before the Honorable Frederick v Pelt Bryan, United States District Judge, and the Court thereafter on April 25, 1969, having handed down its opinion granting the defendant's motion for summary judgment, it is,

ORDERED, ADJUDGED and DECREED: That the defendant H. DAROFF & SONS, INC., have judgment against plaintiff B & L SALES ASSOCIATES dismissing the complaint.

(s) JOHN LIVINGSTON
Clerk

Dated New York, N.Y.
April 25, 1969

APPENDIX C

LISTING OF HEAD NOTES OF RESPONDENT'S BRIEF BEFORE DISTRICT COURT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

History of the Case
The Complaint
Statement of Motion
Discussion of Motion
1. Plaintiff did not originate the words "Come On Strong"
2. The words "Come On Strong" are at best weak or descriptive in a trade-mark sense
3. The plaintiff can prevail at trial only if it proves a secondary meaning
4. The plaintiff cannot establish a secondary meaning at the trial
5. The Unfair Competition Claim
6. The dilution count
7. The words "Come On Strong" are public property
Conclusion

APPENDIX D

ARGUMENT IN RESPONDENT'S BRIEF BEFORE DISTRICT COURT UNDER HEADING "STATEMENT OF MOTION"

Defendant is entitled to judgment as a matter of law because the words "Come On Strong" were not originated by the plaintiff, and these words have not been promoted by plaintiff.

Instead, the words "Come On Strong", as shown in the extensive materials, collected in a separate binder, Exhibits A to C, show that the words "Come On Strong" have been used by others in the entertainment and clothing industries at times prior to and subsequent to the plaintiff's first use of the slogan.

This is exemplified by the Broadway show "Come On Strong" which ran for a month in 1962 as well as a Du Pont Company ad carrying the words "Coming on Strong" which appear in Women's Wear Daily on October 4, 1963.

Both the Broadway show and the Du Pont ad were in existence prior to June of 1964 which is the date of first use alleged in the plaintiff's trade-mark certificate.

In view of the foregoing as well as the other exhibits on file, the plaintiff's alleged trade-mark "Come on Strong" must be deemed weak or descriptive in a trade-mark sense. The only way for the plaintiff to overcome this is to show that the slogan "Come on Strong" has acquired a secondary meaning in plaintiff.

However, discovery depositions of the active partner in the plaintiff partnership show that prior to 1967 the plaintiff and its licensees did not even advertise clothing with the slogan "Come on Strong". Furthermore, during the period 1964 to 1967 the sales by plaintiff and its licensees of clothing carrying the words "Come on Strong" probably

did not exceed two thousand dollars ($2,000.00) per year.

In view of the foregoing, as a matter of law, plaintiff cannot establish a secondary meaning for the slogan "Come on Strong" and therefore judgment should be entered in favor of defendant on all counts.

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2. Petitioner did not originate the phrase "come on strong"	2
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In the
Supreme Court of the United States

October Term, 1969

B & L SALES ASSOCIATES,
Petitioner

v.

H. DAROFF & SONS, INC.,
Respondent

Respondent's Brief In Opposition To Petition For Writ of Certiorari

The Respondent, H. Daroff & Sons, Inc., respectfully submits that the Opinion of the Court of Appeals was proper and correct, and that no Writ of Certiorari should issue.

This is a conventional trade case wherein Petitioner complained mainly about Respondent's advertising.

A review of the Petition for Certiorari shows that Petitioner does not question the constitutionality or interpretation of any part of the trademark laws, but rather, disagrees that the case should be disposed of on Summary Judgment. As such, a Petition for Certiorari merely expresses Petitioner's private complaint, and fails to

assert anything of a public moment that would make this case a matter of national interest.

As explained hereinafter, the grant of Summary Judgment is strictly in accord with the 1963 Amendment to Rule 56(e) of the Federal Rules of Civil Procedure.

1. The phrase "come on strong" is descriptive and in the public domain.

The Court of Appeals stated (A. 18):[1]

> " 'Come on Strong' and variations of that phrase, as the various exhibits amply demonstrate, is a common slang term, the general use of which plaintiff cannot prevent by registering it in connection with certain goods."

The Record of the Court below established beyond all doubt that the term "Come on Strong" is the title of a Broadway play, is the title of numerous songs, is found in certain slang dictionaries, and spontaneously appears even to the present time in commercial and non-commercial literature, broadcasting and everyday parlance.

2. Petitioner did not originate the phrase "come on strong".

Petitioner did not originate the slogan, but instead, has simply attempted to establish a trademark monopoly in it, something which the Court of Appeals forbade.

The foregoing quote from the Court of Appeals' Opinion (A. 18) shows that Petitioner has no basis to complain when Respondent uses the term "Come on Strong" in the precise way that it existed when Petitioner attempted to claim this slogan as its trademark.

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1. "A" refers to the Appendix attached to Petitioner's Brief.

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3. Respondent has used the phrase "come on strong" only in the descriptive meaning and always in connection with its renowned trademarks.

Furthermore, Respondent always applied its renowned names "Botany 500" or "Daroff" prominently in any advertisement which used the phrase "Come on Strong" in a descriptive sense only. As the Court of Appeals stated (A. 16):

> "It is quite obvious that the phrase 'Come on Strong' was intended only to describe the manner in which Botany 500 clothing would assist the purchaser in projecting a commanding, confident, 'strong' image to his friends and admirers, and no intent to use the phrase in a trademark sense can be inferred from these promotional materials. Moreover, the statement by Affidavit of Daroff's vice president that defendant has never directly applied the phrase to its products by tag, label or otherwise is unchallenged."

In view of all of the foregoing it is clear that the case of *Menendez v. Holt*, 128 U.S. 514 (1888)—cited on page 7 of Petitioner's Brief—has no application to the facts at bar since the Courts below found that Respondent in the case at bar simply has not used the slogan "Come on Strong" as a trademark.

4. There is no conflict among decisions of the courts of appeals.

The only case cited as conflicting by Petitioner, on page 8 of its Brief, is *Albert Dickinson Co. v. Mellos Peanut Co.*, 179 F.2d 265 (7th Cir. 1950). However, the decisive point in the *Albert Dickinson* case was that Summary Judgment could not be entered as a matter of law because the District Court had employed the improper test of a side-by-side visual comparison of the trademarks in issue.

The case at bar involves an entirely different point, namely, the association of the descriptive phrase "Come on Strong" with Respondent's nationally known trademarks "BOTANY 500" and "DAROFF".

Furthermore, the *Albert Dickinson* case was decided long before the Amendments to Rule 56(e) of the Federal Rules of Civil Procedure, which now require a positive showing by the non-moving party on penalty of having Summary Judgment granted against him as will be discussed in Section 5 hereof.

5. Petitioner failed to satisfy the burden imposed by Rule 56(e) of the Federal Rules of Civil Procedure.

Rule 56(e) was amended in 1963 to include the following last sentence:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, *but his response by affidavits or as otherwise provided for in this rule, must set forth specific facts showing that there is a genuine issue for trial.* If he does not respond, summary judgment, if appropriate, shall be entered against him." (Emphasis Added)

In the case at bar Respondent filed a properly supported Motion for Summary Judgment.

At this point, Rule 56(e) applies to shift the burden to Petitioner to establish a *genuine* issue of fact, and indeed, Petitioner's Affidavits show numerous attempts to do so.

However, the Court of Appeals recognized that Petitioner's Affidavits could not overcome the major premise upon which Respondent's Motion for Summary Judgment was based. As the Court of Appeals stated (A. 17):

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"It may be that some of the factors listed above were disputed in the pleadings and affidavits, but the trial court correctly concluded that those factors were not sufficient to overcome the obvious inference from the exhibits themselves that no consumer or professional buyer of men's suits could possibly mistake the source of the advertised goods by believing that they were manufactured by plaintiff. That fact alone, weighed against all of plaintiff's allegations, affidavits and arguments eliminated even the possibility of confusion and entitled Daroff to summary judgment."

Furthermore, the Court of Appeals held (A. 17, A. 18) that Respondent was entitled to Summary Judgment on a second ground, namely, a statutory defense of descriptiveness under 15 U.S.C. 1115(b). This second defense clearly transcends Petitioner's arguments which are directed only to the first defense upheld by the Court of Appeals.

6. The courts below have not weighed a number of fact issues.

The portion quoted from the Court of Appeals' Opinion in Section 5 above shows that the Court of Appeals expressly refused to weigh a number of fact issues since it held that the various factors contended for by Petitioner "were not sufficient to overcome the obvious inference from the exhibits themselves . . .".

Furthermore, this Court has expressly ruled that Rule 56(e) cannot be read out of anti-trust cases. See *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 290 (1968), and so there is no reason for reading Rule 56(e) out of the far simpler trade cases, such as the present one which raises conventional issues.

7. Petitioner was fully informed as to the grounds for summary judgment that were relied upon by the courts below.

Both the Court of Appeals and the District Court were in complete agreement that Summary Judgment should be entered in favor of Respondent because Respondent's advertising materials did not constitute an infringement upon Petitioner's rights.

Petitioner is in error on page 12 of its own Brief when it states that Respondent's Motion papers were, directed solely to the issue of invalidity of the mark. Indeed, Appendix C and Appendix D attached to Petitioner's Brief do not support Petitioner's thesis that Respondent's Motion was directed to the issue of invalidity.

In reviewing Appendix C and Appendix D to Petitioner's Brief it will be seen that the word "invalid" does not appear even once in the two Appendices. Instead, the essence of the Appendices is that Petitioner had a weak, *descriptive* mark and was incapable, as a matter of law, of showing a *secondary meaning*. This is the trademark way of saying there is no infringement, and has nothing to do with validity.

8. Petitioner was afforded due process.

In view of the fact that the Courts below correctly applied Rule 56(e), it is clear that Petitioner was fully accorded due process. Thus, the Courts below correctly relieved Respondent of the necessity of having to participate in a trial where Respondent was already entitled to judgment, *as a matter of law*, on two separate and distinct defenses.

While Petitioner briefly makes reference to the denial of its claim to jury trial on pages 3 and 4 of its Brief, Petitioner has failed to specify any constitutional provision,

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statute or grounds for application of any decision of this Court that would sustain the necessity to review any alleged right to trial by jury.

CONCLUSION

There is nothing in the case at bar of a public moment or national interest.

The case involves the simple application of the infringement section of the trademark law (15 U.S.C. 1114[1]) and the defense of descriptiveness (15 U.S.C. 1115[b]). There is no issue as to the constitutionality or interpretation of any portion of the trademark law.

Respondent made a strong showing before the District Court that judgment should be entered in its favor as a matter of law. The Court of Appeals affirmed the District Court. At no time did anything of a public moment or national interest ever appear that would require a review by this Court.

Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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